Sheet Metal Workers' International Association, Local Union 102, AFL–CIO *and* R & J Sheet Metal. Case 21–CB–11412

February 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On August 4, 1993, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Charging Party filed exceptions, a supporting brief, and a reply brief; and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

[1] The judge recommended that jurisdiction be retained for the limited purpose of entertaining a motion for further consideration, if necessary, on the conclusion of the Federal court litigation with respect to the portion of the National Joint Adjustment Board (NJAB) award imposing a new interest arbitration provision. We do not find it necessary to retain jurisdiction under the circumstances of this case. There is no evidence that the Respondent made a distinct, specific request of the National Joint Adjustment Board to include interest arbitration provisions in a new agreement, or otherwise coercively insisted on the inclusion of an interest arbitration clause. See *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258, 261 (1991). In addition, as the judge noted, the Ninth Circuit Court of Appeals, where the district court action regarding the NJAB award in this case is pending, clearly finds interest arbitration language unenforceable in an interest arbitration award. *American Metal Products v. Sheet Metal Workers Local 104*, 794 F.2d 1452, 1457 (9th Cir. 1986). In these circumstances, we find it unnecessary to retain jurisdiction, and we shall dismiss the complaint in its entirety.

Contrary to our dissenting colleagues' view, we are not countenancing ''indefensible litigation'' by refusing to retain jurisdiction in this case. In disagreement with Members Stephens and Cohen, we have held that the Respondent's court action to enforce the NJAB award is itself not unlawful. The mere fact that this court action concerns an NJAB award which contains one provision which probably will not pass judicial muster does not, in and of itself, render the litigation ''indefensible.''

For the reasons Chairman Gould expressed in *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 (1944), he would find interest arbitration clauses to be mandatory subjects of bargaining. He nevertheless presumes that when the parties entered into the agreement containing the interest arbitration clause, they were aware that Board precedent held such clauses to be nonmandatory subjects of bargaining and that any subsequent award providing for interest arbitration could not be imposed on the parties without their mutual consent. Chairman Gould, therefore, agrees with the dismissal of the allegation that the inclusion of an interest arbitration clause in the NJAB award constitutes a violation of Sec. 8(b)(1)(B) and with the finding that it is unnecessary to retain jurisdiction under the circumstances of this case.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBERS STEPHENS and COHEN, dissenting.

For the reasons set forth in Member Stephens' dissenting opinion in *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991), and our dissenting opinion in *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 (1994), we would find that the Respondent violated Section 8(b)(1)(B) of the Act by submitting its unresolved dispute with the Employer to interest arbitration and by filing a counterclaim in the U.S. district court to enforce the National Joint Adjustment Board's award (NJAB), which included an interest arbitration provision.[1]

Jean C. Libby, Esq., for the General Counsel.
Ray Van der Nat, Esq., of Los Angeles, California, for the Respondent.
James A. Bowles, Esq. (Hill, Farrer & Burrill), of Los Angeles, California, for the Charging Party.

[1] Whether or not the Respondent included an interest arbitration provision in its submission to NJAB, it is clear that the NJAB award included an interest arbitration provision, and that, by means of its court action to compel enforcement of the award, the Respondent attempted to impose interest arbitration on the Employer without the latter's consent. Our colleagues' decision not to retain jurisdiction in these circumstances allows the Respondent to engage in indefensible litigation in an effort to seek enforcement of the interest arbitration provision. The apparent futility of this act should not serve as a defense to such patent misconduct.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on March 30 and 31, 1993, in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 21 of the National Labor Relations Board (the Board) on November 19, 1992, based on a charge filed on August 26, 1992, and docketed as Case 21–CB–11412 by R & J Sheet Metal (the Charging Party or the Employer) against Sheet Metal Workers' International Association, Local Union 102, AFL–CIO (Respondent or the Union). Posthearing briefs were submitted on May 19, 1993.

The complaint alleges and the answer denies that Respondent has restrained and coerced the Employer in the selection of its representative for the purpose of collective bargaining in violation of Section 8(b)(1)(B) of the National Labor Relations Act (the Act).

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel, the Charging Party, and Respondent, and

from my observation of the witnesses and their demeanor, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all material times the Charging Party has been a California state corporation with an office and place of business in Huntington Beach, California, where it has been engaged in business as a sheet metal contractor in the building and construction industry. In the course of its business operations at relevant times, the Charging Party annually purchased and received goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of California.

Accordingly, it is undisputed, and I find, that the Charging Party has at all times material been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Charging Party was founded in January 1985 by partners Rocky and Julie Fleeman, husband and wife. Since that time it has operated as a sheet metal contractor in the southern California construction industry.

Respondent is a constituent local of the Sheet Metal Workers' International Association, AFL–CIO (the International) which resulted from the July 1, 1988 amalgamation of Local 509—with jurisdiction over Riverside, San Bernardino, Mono, Inyo, and a portion of Kern Counties—and Local 420—with jurisdiction over Orange and Long Beach Counties. The premerger locals did not continue as separate entities after the merger.

The Sheet Metal and Air Conditioning Contractors National Association, Inc. of Orange County-Long Beach (SMACCNA), a California corporation, has at all times material acted as a multiemployer association representing employers in the sheet metal and air-conditioning construction contracting industry in collective bargaining with locals of the International.

United Sheet Metal and Air Conditioning Contractors Association (United) was a corporation acting as a multiemployer association representing employers in the sheet metal and air-conditioning construction contracting industry in collective bargaining with locals of the International until its merger with SMACCNA on April 1, 1991, and formal corporate dissolution on September 10, 1991.

The parties stipulated that the relationships in dispute between the various locals of the International, including Respondent, and the Charging Party were not relationships falling under Section 9 of the Act but rather were cognizable only under Section 8(f) of the Act.

B. *Events*

1. Events relevant to the 1982–1985 contract

The Charging Party commenced operations in January 1985 with two employees each of whom was a member of Local 108 of the International—a local with jurisdiction over a portion of the Los Angeles area. In or about April 1985 Local 420's president, John Watson, telephoned the Charging Party and indicated he would be sending out an agent of Local 420 to discuss a collective-bargaining agreement. Local 420 Business Manager Carl Moore thereafter visited the Charging Party's offices on several occasions in the period of April to June 1985.

Rocky Fleeman testified that Moore initially met with him and his wife and showed them two copies each of a ''Standard Form of Union Agreement'' and ''Addenda to Standard Form of Union Agreement'' which is a printed compilation of various separately numbered addenda to the standard form agreement. The bulk of the first meeting was dedicated to a discussion of the possibility of transferring the two employees' local union memberships to Local 420. Moore returned a few weeks later and again sought the Charging Party's signature on the contracts. In this conversation or another Rocky Fleeman made it clear to Moore that he did not wish to join either multiemployer association, SMACCNA or United, but rather desired to be an ''Independent.'' At a third meeting in or around June 1985, Fleeman signed two copies of both the standard form contract and addenda with the blank spaces on the forms providing for specific entries generally left blank.

Julie Fleeman testified that as part of the contract signing process she filled in some blank spaces on the contract and addenda but not all. Rocky Fleeman signed two copies each of the contract and addenda and all copies were taken by Moore. In a few weeks the Charging Party received a copy of each document in the mail with various additional blanks filled in, such as the notation ''Independent'' in the space marked ''Specify Name of Association'' on the signature page. The returned contract and addenda also bore the signature of John Watson and Local 420's embossed seal. The filled-in contract was effective by its terms from June 12 to 30, 1985—a period of approximately 2 weeks.

Moore's recollection of these events was poor. He did not challenge the testimony of the Fleemans respecting the specifics of the events. He testified that his general practice was to describe the three choices available to signatory employers concerning the multiemployer bargaining representative associations: join SMACCNA, join United, or be an independent contractor. He testified:

> If they wanted to be SMACCNA or United, there was an industry fund fee that went into the industry fund. If they did not wish to belong to either association, they paid the same amount of money on the bottom line, but the money would go, instead of going to the associations, we would use it for the apprentice training.

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

The payments involved were generated by deducting 30 cents per employee working hour from unit employees' gross wages.

2. Events relevant to the 1985–1988 contract

Local 420 negotiated identical July 1, 1985—June 30, 1988 contracts with SMACCNA and United. Thereafter Local 420 had the agreement printed into standard forms. Moore and the Fleemans testified that later in the summer of 1985 or thereafter Moore had several meetings with the Fleemans and ultimately obtained Rocky Fleeman's signature on the new agreement. A contractor's information sheet was also supplied by Moore, signed and returned by the Fleemans. The state of the form contract and addenda at the time of their signature by the Charging Party as well as the extent to which the contract information sheet had been filled out by the Charging Party was in dispute.

The 1985–1988 agreement, like the earlier agreement, consisted of two forms—a ''Standard Form of Union Agreement'' and ''Addenda to Standard Form of Union Agreement.'' Throughout the forms, blank spaces were provided for the entry of specific details such as dates, employer names, and titles. The 1985–1988 standard form provided, inter alia:

> ARTICLE X
>
> SECTION 1. Grievances of the Employer or the Union, arising out of interpretation or enforcement of this Agreement, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. . . .
>
> SECTION 2. Grievances not settled as provided in Section 1 of this Article may be appealed by either party to the Local Joint Adjustment Board . . . . Except in the case of a deadlock, a decision of a Local Joint Adjustment Board shall be final and binding.
>
> . . . .
>
> SECTION 5. A Local Joint Adjustment Board, Panel and National Joint Adjustment Board are empowered to render such decisions and grant such relief to either party as they deem necessary and proper, including awards of damages and other compensation.
>
> . . . .
>
> SECTION 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:
>
> (a) Should the negotiations for a renewal of this Agreement become deadlocked in the opinion of the Union representative(s) or of the employer(s) representatives, or both, notice to that effect shall be given to the National Joint Adjustment Board.
>
> . . . .
>
> ARTICLE XII
>
> SECTION 4. By execution of the Agreement the Employer authorizes (Name of Local Contractor Association) to act as its collective bargaining representative for all matters relating to this agreement. The parties agree that the Employer will hereafter be a member of the multi-employer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least 150 days prior to the then current expiration date of the Agreement.

The 1985–1988 addenda supplemental form contains blank spaces only on its final page for signatures, names, addresses, dates, the name of the association involved, and certain other matters. The addenda supplemental form also contained the following language:

> Addendum No. 59
>
> SECTION 1. A ''bad faith employer'' for purposes of this Agreement is an Employer that itself . . . engages in work within the scope of [the contract] using employees whose wage package, hours and working conditions are inferior to those prescribed in this agreement . . . .
>
> SECTION 2. Any employer that signs this Agreement . . . expressly warrants that it is not a ''bad-faith employer'' as such term is defined in Section 1 hereinabove and, further, agrees to advise the union promptly if at any time during the life of this Agreement said employer changes its mode of operations and becomes a ''bad-faith employer.'' Failure to give timely notice of being or becoming a ''bad-faith employer'' shall be viewed as fraudulent conduct on the part of such Employer.
>
> . . . .
>
> Addendum No. 62—Contract Reopener Clause
>
> This Agreement and Addenda . . . shall continue in force from year to year unless written notice of reopening is given not less than One Hundred Fifty (150) days nor more than One Hundred Eighty (180) days prior to the expiration date.
>
> . . . .
>
> Addendum No. 64—Term of Contract
>
> This addendum shall . . . remain in effect up to and including June 30, 1988, under the terms set forth in Article 13 of the Standard Form of Union Agreement, Form A-3-85.

The contractor's information sheet provides blank spaces for the entry of the contractor's name, the Association or Independent status of the contractor, the association designated to receive ''Industry Fund'' payments, the contractor's payday, and the day of the week the signatory employer's payroll period ends.

Moore testified that the circumstances of the contract's signing, submission to the Union, and return to the Fleemans were not clear in his mind. He testified that it was quite likely that the only blanks that would have been filled in at the time the preprinted forms were delivered to the Charging Party for completion and signature would have been the date of the contract and the employer's name and address with the remainder of the information being subsequently provided by

the employer either through filling in the blank spaces on the contract forms or on the information sheet.

Rocky Fleeman testified that he finally accepted the Union's demand that he sign the contract without modification and signed the 1985–1988 standard contract form,[2] the preprinted addenda, and a separate contractor information sheet. Respecting the entries in the various blank spaces the documents contained, he testified that at the time he signed them his wife had added their contractor's license number and their insurance carrier's name, but that the other filled-in entries which now appear on the document copies in evidence and which were on the contract forms when the Charging Party later received its copies from the Union had not been entered by the Charging Party or with its authorization or knowledge and were blank when the documents were returned to the Union. Rocky Fleeman noted particularly the word ''United'' had not been entered on the addenda supplemental form or the standard contract. Similarly the contractor's information sheet did not have any ''Xs'' entered designating United as either the Charging Party's selected collective-bargaining association or the entity to receive the industry fund payments discussed supra.

Julie Fleeman testified that after Moore and her husband came to ''some sort of'' an agreement, she was asked to type in certain information on the three documents and did so entering the Charging Party's contractor's license number, the relevant geographical zone number, classification, and the names of the Charging Party's compensation and disability carriers. Julie Fleeman was sure the Employer's name and address were entered in appropriate blanks by this time, but was equally sure the word ''United'' or its designation in any way had not been entered on the contract, the addenda, or the contractor's information sheet.[3] Further, Julie Fleeman denied that the Employer's payroll period and payday information entered on the contract information sheet were either entered by her or were factually correct entries for the Charging Party at the time.

While there was conflicting evidence whether Moore physically took the signed copies with him or whether they were mailed to Local 420, there is no dispute that both sets of signed documents were given by the Charging Party to Local 420. Further there is no dispute that, in time, the Charging Party received one copy each of the contract and the addenda from Local 420. On the copy of the 1985–1988 contract received by the Charging Party from Local 420 the blank space for the ''Name of Local Contractor Association'' contained the typewritten entry ''United,'' thus by its terms assigning bargaining rights to that entity. The addenda supplemental form also bore the typewritten entry ''United'' in the space for ''Specify Name of Association.''

The Fleemans testified that on receiving the documents back from Local 420 they simply noted that the Union's agent, John Watson, had signed the documents and had thereafter simply filed the documents away without further study and, more particularly, without noticing the ''United'' entries in the spaces noted supra.

The Charging Party had begun to apply the terms of the new contract to its employees at the time it came into effect for the association units.[4] After Rocky Fleeman signed the 1985–1988 contract, the Charging Party continued to apply its terms. It remitted its industry fund payments to the union trust without identifying what was to be done with the funds. It was uncontested that the Charging Party has never been a member of United or SMACCNA. Nor was there evidence or suggestion that United or SMACCNA believed or represented to the Union that the Charging Party was in fact an association member, had assigned bargaining rights to an association, or had informed the union that either association was bargaining on the Charging Party's behalf. The industry fund deductions remitted by the Charging Party were paid to SMACCNA at all material times although there is no record evidence that either the Charging Party or the Union's agents involved here knew of this fact at relevant times.

3. Events relevant to the disputed 1988–1991 contract

Sometime in 1987 the Fleemans retained counsel concerning labor issues and brought copies of the 1985–1988 contract and addenda to counsel for his review. Although Julie Fleeman testified that counsel was told that the Charging Party was not and had never been a member of United, but was rather an ''independent,'' counsel advised that three provisions of the contract and addenda had to be met to avoid automatic renewal of the agreement. With this discussion in mind, Julie Fleeman prepared and Rocky Fleeman signed and sent identical letters dated January 15, 1988, to the International, Local 420, and United with the following text:

> Please be advised that R & J's Sheet Metal wishes to exercise their right under the Contract Reopener Claus[e]—Addendum No. 62 in our Union Agreement.
>
> We are at this time advising you that we are reopening negotiations and do not wish to automatically continue with our original agreement.

On January 30, 1988, Local 420 sent ''Article XIII'' reopener letters to ''all employers and associations signatory to the existing standard form of Union Agreement and Addenda'' giving ''the required notice of re-opening'' and making an offer to meet and confer to negotiate a new agreement. A copy of the letter was sent to the Charging Party. In early 1988, Local 420 began negotiations with United and SMACCNA for successor agreements. The associations provided lists of the employers for whom they were negotiating. The Charging Party was not named on either list. On or about July 1, 1988, Local 420 merged with Local 509 to

[2] Rocky Fleeman also testified that during these negotiations, he told Moore repeatedly he was indifferent to where the mandatory deduction from his employees' wages should be sent, since he had to deduct it in all events. He reiterated to Moore his status as an independent, not a member of SMACCNA nor United. Fleeman testified Moore told him that, if he did not choose where the funds were to go, the Union would. He further testified that he never learned to what entity the moneys had been distributed.

[3] Julie Fleeman further testified that the contested entries appearing in the documents in evidence were not made by the Employer's typewriter—the only typewriter in the Charging Party's possession at relevant times. Exemplars placed into evidence which were identified by Julie Fleeman as coming from this typewriter are consistent with her testimony.

[4] While the record is not crystal clear, the Charging Party utilized an accounting service for payroll matters which service was apparently familiar with the industry contract rates and automatically put contract changes in wages and fringes into effect for the Charging Party's covered employees.

form Respondent. Negotiations continued between the associations and Respondent until late 1988 or early 1989 when identical agreements were reached between Respondent and each association for its respective multiemployer unit.

The contracts were effective on their face from July 1, 1988, to June 30, 1991. Each contained the following provisions:

> ARTICLE X
>
> The Union and the Employer, whether party to this Agreement independently or as a member of a multiemployer bargaining unit, agree to utilize and be bound by this Article.
>
> . . . .
>
> SECTION 2. Grievances . . . may be appealed by either party to the Local Joint Adjustment Board. The Board shall consist of representatives of the Union and of the local Employer's Association and both sides shall cast an equal number of votes at each meeting. . . . Except in the case of a deadlock, a decision of a Local Joint Adjustment Board shall be final and binding.
>
> . . . .
>
> SECTION 8. In addition to the settlement of grievances arising out of interpretations or enforcement of this agreement . . . any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:
>
> . . . .
>
> The dispute shall be submitted to the National Joint Adjustment Board . . . .
>
> . . . .
>
> (d) . . . all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.
>
> . . . .
>
> Addendum No. 67
>
> This Agreement is signed by the respective Contractors Associations on behalf of their members per list submitted by the Contractors Associations to the Union.

Rocky Fleeman testified that he had contacted Respondent's business agent, James Weaver, after July 1, 1988, seeking to negotiate a new agreement, but that Weaver obtained delays first until the association agreements could be negotiated and then until they could be printed as standard contracts and addenda. In July 1990 Weaver visited the Charging Party's office bringing with him Respondent's 1988–1991 standard form of union agreement, addenda supplemental form, and contractor's information sheet with the Charging Party's name entered in appropriate blank spaces, but no entries in the blank spaces provided for the name of the appropriate representing association.

Rocky Fleeman testified that when Weaver initially met with him, Weaver explained the changes in the agreement and Fleeman responded that he needed concessions. Weaver, in Fleeman's recollection, alluded to a ''union resolution'' which would be of assistance to the Charging Party and said he would supply more information. Information respecting the matter was sent to the Charging Party by the Union some time later.

Rocky Fleeman testified that Weaver revisited the Charging Party about 1 month after his initial visit. Fleeman again pressed for concessions, but Weaver was unavailing insisting the contract be signed as written. Fleeman refused. A third visit occurred which was essentially a reprise of the second. In these latter meetings Fleeman testified that Weaver told him the Charging Party was bound to the 1988–1991 United contract.

James Weaver testified that he initially met with the Fleemans in late July or early August 1988 with two or three subsequent meetings occurring into 1989 and 1990. Weaver recalled that he sought Rocky Fleeman's signature on the contract and that Fleeman refused. Special programs the Union maintained providing relief to signatory contractors were discussed, but Fleeman would not accept the contract as written and Weaver would not accept any changes. Weaver testified:

> During the discussion I told him, as far as I was considered, he was bound to the agreement due to the fact that United had negotiated the agreement on his behalf.
>
> . . . .
>
> Mr. Fleeman said that he was not a member of United. . . . I had told him according to the contract he had to sign the contract giving United his bargaining rights. Whether he was a member of United or not, they still had his bargaining rights.

There is no contention that Rocky Fleeman ever agreed to sign the 1988–1991 agreement or actually did so.

By letter dated February 27, 1991, to Respondent, Julie Fleeman stated in part:

> Please be advised that R & J Sheet Metal is unable to sign the Union Agreement under its present terms and conditions. We will require concessions in order to come to an equitable solution[ ].

Receiving no response, Julie Fleeman on April 30, 1991, again wrote the Union a letter containing the following:

> Pursuant to our letter of February 27, 1991 we are once again informing you that we are unable to sign the Union Agreement as it stands under it[ ]s present terms. We must have concessions to this agreement.
>
> We are willing to discuss alternatives, however, this must be done within a time frame. Or, are we to assume that you have no interest in negotiating this matter.

Counsel for Respondent Van der Nat responded to Julie Fleeman by letter dated May 16, 1991, stating in part:

> Your notice of April 30, 1991 and its reference to your correspondence of February 27, 1991 is untimely pursuant to article XIII section 5 of your current agreement with Local 102.
>
> Accordingly, we do not believe that we have an obligation to bargain with you separately and will expect that you abide by the successor agreement negotiated between Local 102 and the Association.

Julie Fleeman answered by letter dated May 22, 1991, stating in part:

> Upon reviewing your letter [of May 16, 1991], it is evident that your are not in possession of all the facts. Enclosed please find a copy of letter dated January 15, 1988 in which we reserve the right to reopen negotiations.
>
> Please be advised that negotiations must be completed prior to July 1, 1991.

Counsel for the Union responded by letter dated May 28, 1991. In that letter counsel argued that the Charging Party was bound to the 1985–1988 contract and that the Charging Party's letter of January 15, 1988, simply served to prevent that contract from automatically renewing. Counsel asserted the letter had no effect on the proposition that the Charging Party was bound to the 1988–1991 agreement. Counsel further contended the Charging Party's letter of April 30, 1991, was untimely respecting any new agreement because, under article XIII, section 5, 150 days' notice of an intention not to be ''bound by the next agreement as part of the multi-employer bargaining unit'' must be given both to the employer association and the Union. The letter concluded: ''Accordingly, no separate negotiations are necessary and we will consider you automatically bound to the new Local 102 agreement.''

Julie Fleeman responded by letter dated May 30, 1991, which contained the following text:

> It appears that you are regarding our letter of February 27, 1991 as the one hundred and fifty (150) day notice. This is *not* [emphasis in original] the case. Our notice was formally given to the Union per our letter of January 15, 1988. We should have no cause to send it again as we have not been signatory since the July 1, 1985 to June 30, 1988 agreement with Local #420. Our letter of February 27, 1991 was stating we were still unable to sign the agreement of July 1, 1988 to June 30, 1991 with Local #102. We have never been signatory with Local 102.

During the period July 1, 1988, to June 30, 1991, the Charging Party honored Respondent's 1988–1991 contract's terms and made appropriate trust payments to the contractually designated trusts only on behalf of employees hired before July 1988. It did not use the Union's hiring hall during this period and did not pay new hires contract rates or benefits.

The Charging Party did not inform the Union of its application of the contract only to employees hired before July 1, 1988, of its discontinuance of use of the Union's hiring hall or of the fact and the identities of new unit employee hires. The Charging Party generated payment reports received by the Union named only covered employees so it was not obvious from those reports that new, uncovered employees were also doing unit work without appropriate fringe contributions being made on their behalf.

Periodically during the period, the Charging Party solicited from the Union ''current status of union benefit letters'' and ''letters of concurrence'' required of the Charging Party as a subcontractor by contractors on certain projects.[5] Letters solicited by the Charging Party and supplied by the Union to the Charging Party for transmission to general contractors in this period certified that the Charging Party was ''current in all fringe reports and monies owed to the Local Union and our Trust Funds'' or that the Union's hiring hall operations under the collective-bargaining agreement did not discriminate against women and minorities. One letter in evidence stated:

> This company has been a signatory contractor, signed to a Collective Bargaining Agreement with this Local Union for many years. To the best of my knowledge the company has always been current with these reports.

There is no evidence the Charging Party ever corrected the factual assertions of the solicited letters either to the general contractors involved or to the Union.

Rocky Fleeman testified that early in 1991 he informed those of his employees who were still working under the terms of the 1988–1991 contract that in July 1991, i.e., after the 1988–1991 contract's June 30, 1991 expiration date, he was going to stop sending in fringe contributions on their behalf to the Union, but would rather pay the employees the cash equivalent directly. Rocky Fleeman testified the date chosen to discontinue fringe payments was taken from the expiration date of the contract, not because the Charging Party was bound to the 1988–1991 contract, but rather because waiting until July 1, 1991, to stop all contract coverage represented a fair passage of time by the Charging Party during which the Union had been provided an opportunity by the Charging Party to enter into a contract with it.

As part of the merger of United and SMACCNA, Respondent and United entered into the following agreement on United's letterhead signed and dated by each party on March 28, 1991:

> This letter is to confirm our recent telephone conversations regarding this Association and Orange County-Long Beach SMACCNA's merger and your agreement to rescind the United Local 102 Collective-Bargaining Agreement as a result of said merger.
>
> Members of United, as a result of the merger, have agreed to become bound to the Local 102-SMACCNA agreement, effective April 1, 1991. Signed membership applications with bargaining commitments are on file at Orange County-Long Beach SMACCNA.
>
> Therefore it is requested that you provide written agreement cancelling the United-Local 102 Collective-Bargaining Agreement, effective March 31, 199l.
>
> Please execute and date of copy of this letter providing consent to rescind the United Local 102 agreement, and return a signed copy for our files.

There was no evidence or argument that the Charging Party, other than as a result of the disputed 1985–1988 contract, ever assigned bargaining rights to either association, ever applied for or became a member of either association,

[5] As a result of various Federal, state, and local laws and regulations, the certifications were necessary, if the Charging Party was to be eligible for work on certain commercial jobs.

or was regarded by United or SMACCNA at anytime as a member. While the record suggests SMACCNA received the Charging Party's industry fund payments, there is no evidence, other than the disputed contract entries and related evidence including the Charging Party's June 15, 1988 letter, discussed supra, of a membership or principal-agent relationship between either SMACCNA and/or United and the Charging Party at any time.

4. Events after June 30, 1991

The 1988–1991 contract on its face expired on June 30, 1991. On July 2, 1991, Julie Fleeman sent a letter to the Union with the following text:

> July 2, 1991 has now arrived and no one on the behalf of the Union has contact[ed] me since the last letter that we received from your lawyer. I am perplexed by your lack of interest to negotiate with my firm. As you are aware we had placed a deadline to end negotiations, as this matter had carried forth from three years. The Union's ''no-care'' attitude towards the men in our employ as well as our firm is mystifying.
>
> As no resolution has been reached, please remove our firm from your roster.

The Charging Party thereafter neither recognized the Union as a representative of its employees nor followed the terms of any collective-bargaining agreement with respect to any of its employees.

Soon thereafter the Union entered into a new agreement with SMACCNA, the surviving entity of the now merged United, and SMACCNA associations for the period July 1, 1991, through June 30, 1994. The new contract carried forward the interest arbitration provisions of the previous contracts.

On November 4, 1991, the Union filed a charge with Region 21 of the Board docketed as Case 21–CA–28358 against the Charging Party alleging: ''Within the past six (6) months, the employer has refused to comply with an agreement reached on its behalf by its own chosen representative.'' Following a Regional determination that the charge lacked merit, it was withdrawn with the Regional Director's approval on December 18, 1991.

By letter dated March 23, 1992, Respondent informed the Charging Party:

> Local 102 has been trying to resolve the contract for wages and conditions with you to no avail.
>
> As per Article X, Section 8 A (Grievance Procedure), negotiations have reached a deadlock position. Notice to that effect shall be sent to the General President of the Sheet Metal Workers' International Association and the National Office of the Sheet Metal and Air Conditioning Contractors National Association, Inc.
>
> This letter will give notice to R & J Sheet Metal that Sheet Metal Workers' Local 102 considers negotiations deadlocked and requests the assistance of the National Joint Adjustment Board to settle this matter.

The Union thereafter initiated an interest arbitration. The National Joint Adjustment Board on July 2, 1992, issued a decision on the matter containing the following:

> The National Joint Adjustment Board met in St. Paul, Minnesota on June 30, 1992 . . . . James Weaver, Carl Moore and Ray Van Der Nat appeared on behalf of the local union. There were no appearances on behalf of the contractor, although it had been duly advised of the time and place of the hearing and afforded an opportunity to appear and be heard in the matter. . . .
>
> A review of the record demonstrated that all procedural requirements had been met; and the matter, therefore, was properly before the NJAB for decision.
>
> The record reflected that the parties had not resolved any issues concerning terms for a new commercial agreement, the NJAB reached the following unanimous decision.
>
> 1. R & J Sheet Metal shall execute a collective bargaining agreement with an effective date of July 1, 1991, incorporating terms and conditions identical to the commercial agreement between SMACCNA-Orange County-Long Beach and Sheet Metal Workers Local 102.[6]
>
> Your attention is directed to the following language contained in Article X, Section 8(a) of the Standard Form of Union Agreement:
>
> > The unanimous decision of said Board shall be final and binding on the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached.

The Union also initiated a Local Joint Adjustment Board action against the Charging Party under the 1988–1991 agreement asserting that the Charging Party was bound to the 1991 agreement and had failed to apply its terms to employees for the period July 1, 1991, to July 1, 1992. A hearing was held on July 7, 1992, at which the Charging Party and Respondent appeared and presented their cases.

On July 22, 1992, the Local Joint Adjustment Board issued its decision. It found that the Union had established that:

> 1. The Company was signatory to the 1985–1988 Agreement, and the Company was bound by the 1988–1991 Agreement.
>
> 2. The Company was part of the Multi-Employer bargaining unit and bound by the association agreement, by virtue of the failure to give proper notice as required by Article XIII section 5 of the Standard Form of Union Agreement.
>
> 3. Local 102 had requested bargaining for a successor agreement but the Company refused to meet for negotiations.
>
> 4. Since July 1, 1991, the company has failed and refused to pay the fringe benefit contributions and the union dues pursuant to the 1988–1991 agreement.

[6] In an errata dated July 9, 1992, the National Joint Adjustment Board changed the original award's reference to the 1991–1994 ''United'' contract to the ''SMACCNA'' contract. As noted supra the associations had previously merged with SMACCNA, the surviving association. There was therefore but a single 1991–1994 agreement.

> 5. Article X section 5 and Article XIII section 1 requires that the company continue in full force and effect all of the terms and conditions of the 1988–1991 agreement while they are attempting to negotiate a successor agreement, or are going thru the procedures outline in Article X section 8 of the Agreement.

The decision awarded the Union $346,032 in delinquent fringe benefit contributions and $3600 in union dues to be paid by the Charging Party. It further required the Charging Party to comply with the 1988–1991 agreement until negotiations for a new agreement either reached impasse or were resolved by the National Joint Adjustment Board.

Thereafter the Charging Party initiated an action in the United States District Court for the Central District of California, *R & J Sheet Metal v. Sheet Metal Workers Local 102*, Case SA CV 92–626 LHM (RWRx), seeking to vacate the awards of the National Joint Adjustment Board and the Local Joint Adjustment Board, described supra. In that action Respondent cross-petitioned or counterclaimed for enforcement of the two awards. The U.S. district court action is pending before the Honorable District Court Judge McLaughlin who has stayed the proceedings pending the outcome of the instant litigation.

C. *The Issues, Positions, and Arguments of the Parties*

1. The allegations of the complaint

The complaint alleges that Respondent has never had a collective-bargaining relationship with the Charging Party concerning its employees and that the Charging Party has never at any time been a member of or selected the Sheet Metal and Air Conditioning Contractors National Association as its representative for the purpose of collective bargaining or the adjustment of grievances.

Paragraph 8 of the complaint alleges:

> (a) On or about March 23, 1993, Respondent by Moore, in a letter, in effect invoked the provisions for interest arbitration in a labor agreement between Respondent and SMACCNA and informed the Employer that it would request the assistance of the National Joint Adjustment Board of the Union and SMACCNA to resolve a contract dispute between Respondent and the Employer.
>
> (b) Since about March 23, 1992, Respondent has coerced the Employer, with the object of forcing the Employer to join and be bound to SMACCNA or select it as the Employer's bargaining representative.

The complaint further alleges this conduct violates Section 8(b)(1)(B) of the Act.

2. The issues narrowed: Questions of contract and deferral

There is no dispute that the Union threatened to invoke and then invoked contract interest arbitration provisions against the Charging Party. The National Joint Adjustment Board considered the Union's claims and directed the Charging Party to execute the SMACCNA 1991–1994 agreement which itself contains an interest arbitration provision. The Union is asserting the validity of the National Joint Adjustment Board award against the Charging Party in Federal district court.

There is no contention that unless the Charging Party was contractually bound to the interest arbitration process invoked by the Union, Section 8(b)(1)(B) of the Act, which makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances, was violated. The existence of a contractual obligation and the standard for determining if such an obligation existed justifying the Union's actions was the heart of the dispute between the parties.[7]

The contract issue in the instant case has two aspects. The first aspect is the question of whether or not there is a contractual obligation on the part of the Charging Party and a concomitant right on the part of the Union to take the interest arbitration matter to the National Joint Adjustment Board. Related to that issue is the validity of the resulting interest arbitration award. This issue is a conventionally disputed matter in Section 8(b)(1)(B) of the Act under unfair labor practice cases.

The second aspect of this case arises from the less common proposition that the parties are simultaneously litigating this dispute before the U.S. district court in an action brought by the Charging Party which seeks, inter alia, that the court set aside the National Joint Adjustment Board award and which action is defended by Respondent who is asserting the validity of that award. Such a context alters the standard the Board uses in evaluating the Union's assertions of a contract right to force an employer into interest arbitration. In such a setting the Board must also consider whether it should stay its hand in the matter deferring to the U.S. district court so that the court may definitively resolve the contract issue as well as the validity of the interest arbitration award.

The parties' arguments concerning both issues are set forth separately below.

3. The parties' arguments respecting the Charging Party's contract obligation

Respondent's contract argument may be easily stated in its simplest form. The Charging Party signed the 1982–1985 contract and thereafter the 1985–1988 contract. By the explicit terms of the 1985–1988 contract which is in evidence, the Charging Party authorized United to enter into the 1988–1991 contract with the Union on the Charging Party's behalf. United in fact agreed to the 1988–1991 contract thereby binding the Charging Party to its terms. The 1988–1991 contract contained valid interest arbitration provisions properly invoked by the Union which produced a valid National Joint Adjustment Board award binding on the Charging Party.

The simplicity of the recitation belies the factual and legal complexities raised by the parties in litigating both the events and related contract interpretation issues. Thus the chronology of events and what actions were taken by the parties respecting the contracts, i.e., what contract entries had been made or authorized on particular documents at particular

[7] A second issue, whether, even under contractually established procedures, the Charging Party may be properly bound in an otherwise proper interest arbitration proceeding to a new contract which itself contains mandatory interest arbitration language, is discussed separately, infra. See sec. III,D,3.

times and who knew or should have known of the relevant states of affairs at relevant times, was the subject of conflicting testimony and able argument. The parties also closely argued the meaning of various contract provisions and their consequences in light of the actions of the parties.

The General Counsel and the Charging Party argued that the Charging Party signed the 1982–1985 and 1985–1988 contracts as an independent employer and that the testimony of the Fleemans establishes that the 1985–1988 contract signed by Rocky Fleeman was altered after the fact by adding ''United'' as an authorized bargaining agent of the Charging Party.

Respondent seeks to rely on the 1985–1988 contract as physically received into evidence. Counsel for Respondent vigorously contests the factual assertions of the General Counsel that the contract was not signed in its present form or that the Union or its predecessor, Local 420, somehow fraudulently altered the document from the agreement of the parties. Respondent emphasizes the veracity of its witnesses and their lack of motive to alter the document. Further Respondent challenges the credibility of the Fleemans. Thus, Respondent emphasizes a variety of arguably impeaching evidence: (1) the Fleemans indisputably received the 1985–1988 contract in its current condition with the ''United'' entries from the Union clearly present, but never protested the entries at issue even after consulting with their counsel; (2) the Charging Party solicited from Respondent certifications that it was a signatory contractor with the Union at a time when, if its current argument were credited, it was not; and (3) that the Charging Party was dishonest in not covering all employees doing unit work under the contract and fraudulently maintained the subterfuge by not disclosing these facts to Respondent as they were committed to by the terms of the contract.

The Charging Party and the General Counsel emphasize that neither United nor SMACCNA ever acted on the Charging Party's behalf respecting the 1988–1991 agreement or that the Charging Party ever adopted the actions of United or SMACCNA respecting such an agreement. Respondent argues that by the terms of the 1985–1988 agreement signed by the Charging Party it was bound to the United 1988–1991 agreement either under an agency or an independent adoption theory. Respondent again notes that the Charging Party took the benefit of the 1988–1991 contract by inducing the Union to certify that it was signatory to a contract with Respondent—not predecessor Local 420, and as to some employees complied with the 1988–1991 contract's terms filing reports and submitting fringe payments in accordance with its requirements.

The General Counsel and the Charging Party argue that the Charging Party's letter of January 15, 1988, to all parties prevented any extension or automatic renewal of the 1985–1988 agreement. Respondent argues that the January 15, 1988 letter of Julie Fleeman shows that it knew United was its representative and bargaining agent for negotiating the next agreement. Counsel for Respondent further argues the letter may have acted to prevent renewal of the then existing agreement, but under the provisions of the contract did not withdraw the bargaining authority given to United with respect to a new agreement.

The General Counsel argues in the alternative that, even if the Charging Party is found to have delegated bargaining authority to United and did not effectively terminate the 1985–1988 agreement, Respondent was not entitled to rely on the 1988–1991 agreement to submit an interest arbitration dispute to the National Joint Adjustment Board for two reasons. First, the General Counsel argues that the Charging Party never agreed to all the terms of the 1988–1991 agreement and therefore cannot be held to have agreed to it simply through substantial compliance with its provisions. The General Counsel notes that the Union had not been the previously recognized representative of employees and that Respondent has not demonstrated the local merger preserved continuity of representation.

Respondent reasserts its argument that United bound the Charging Party to the agreement. Respondent argues further however, that the Charging Party solicited, obtained, and disseminated certifications from the Union that it was in fact a signatory employer and not in arrears under the terms of the current contract at a time when it was surreptitiously only selectively applying the contract and wrongfully withholding contract wages and fringe benefits from employees and the appropriate union trust funds. Thus to the Union and to contractors for whom it was working, Respondent held itself out as bound to and honoring the 1988–1991 contract with the Union and must now be held to its word on which the Union and others have relied to their detriment. Answering the union merger argument of the General Counsel, Respondent notes the recognition of Respondent involved here is contractual not statutory and points out that the parties stipulated the statutory relationships at issue herein are governed by Section 8(f) of the Act not Section 9.

The General Counsel argues that, even if somehow bound to the 1988–1991 contract initially, the Charging Party could not be held to its terms, including the interest arbitration terms after March 1991, because the 1988–1991 United contract was rescinded on March 31, 1991, as part of the merger of United and SMACCNA and the Charging Party was never even arguably bound to any later contract. Respondent disputes the General Counsel's contention that the March 28, 1991 Union-United document quoted in full supra is a contract rescission either for United Association members, for independent employers who adopted the agreement, or for the Charging Party in any event.

4. The parties' arguments respecting deferral

As noted, supra, the parties agree that the heart of the dispute here turns first on the issue of the existence of a binding contract and second on the interpretation and application of the terms of such an agreement, if found, to the Union's conduct and the resulting award. These identical issues are squarely before the U.S. district court in the parties' current action noted supra.

Where a court action and an unfair labor practice action respecting the same contract issue are simultaneously maintained by the parties, the question of Board deferral to the court litigation arises. The Board has considered the question where both an 8(b)(1)(B) of the Act interest arbitration award complaint and Federal court litigation respecting the validity of the award are involved. The Board's recent line of cases starting with the fountainhead case of *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989), was recognized as applicable to the instant case by all parties.

The *Collier Electric* line of cases, as discussed in greater detail infra, holds that where the contract claims of the union in defending an interest arbitration award are before a court of competent jurisdiction, the Board should limit its inquiry in an 8(b)(1)(B) unfair labor practice case to whether or not the union's contract claims are arguable and, if it so finds, the Board will stay its hand deferring to the court and dismiss the complaint.

In arguing the merits of the instant case under the deferral cases, Respondent in effect reasserted its earlier contract arguments, as described supra, noting that it was not necessary for Respondent to conclusively establish its case but rather only to show that its contract claims were arguable. The Charging Party and the General Counsel in this portion of their cases likewise framed their arguments in like terms arguing Respondent's contract positions were inarguable.

5. The issue of the Local Joint Adjustment Board action

A collateral argument was presented respecting the extent of the 8(b)(1)(B) violation alleged and the scope of the General Counsel's requested remedy. As noted, supra, Respondent initiated separate arbitration actions based on contract claims: one, the interest arbitration matter before the National Board of Adjustment; and, the other, an action before the Local Joint Adjustment Board alleging the Charging Party had failed to abide by the terms of the contract in the period July 1991–July 1992. Both the Local and National Joint Adjustment Board actions were challenged by the Charging Party in its Federal lawsuit. Both awards were alleged as valid in Respondent's counterclaim.

The General Counsel's complaint and requested remedy as explained by counsel for the General Counsel's remarks on the record and on brief address only the interest arbitration proceeding, the decision of the National Joint Adjustment Board and Respondent's counterclaim in Federal court concerning that particular award. The Charging Party argues that the action of Respondent in making its claim to the Local Joint Adjustment Board, the Local Joint Adjustment Board decision, and Respondent's counterclaim assertions of the validity of the Local Joint Adjustment Board award should also be held as violations of Section 8(b)(1)(B) of the Act and dealt with equally in any directed remedy here.

Respondent emphases on brief that the complaint does not allege as unlawful the Local Joint Adjustment Board grievance, resulting award, and Federal court litigation. Counsel for Respondent argues on brief at 27–28:

> Since the decision of the LJAB [G.C. Exh. 18] was a ''rights'' arbitration award involving mandatory, rather than permissive, subjects of bargaining, *Collier*, supra, and its progeny do not apply.

Respondent further argues that the existence of an issue before the district court that the Board unfair labor practice proceeding does not address is a further basis for deferring the instant matter to the court proceeding.

D. *Analysis and Conclusions*

1. The Board's *Collier Electric* doctrine

In *Electrical Workers IBEW Local 113 (Collier Electric)*, supra, 296 NLRB 1095, the Board established a new framework for analysis in situations where a union submits bargaining issues to interest arbitration concerning an employer who had withdrawn from a multiemployer association. The Board stated at 1098:

> First, we shall consider whether there is a reasonable basis in fact and law for the union's submission of unresolved bargaining issues to interest arbitration. In determining whether there is, we will decide whether the parties' collective-bargaining agreement arguably still binds a single employer, who has timely withdrawn from the multiemployer association, to the interest arbitration provision. If the collective-bargaining agreement at least arguably binds the employer to the arbitration provision, the union will be free to seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration, and by pursuing a Section 301 suit in court, without violating Section 8(b)(3) or 8(b)(1)(B) of the Act. On the other hand, if the agreement does not even arguably bind the employer to the arbitration provision, i.e., the contract contains language explicitly stating that an employer who has withdrawn from the multiemployer association is not bound to interest arbitration, then the union's submission of the unresolved bargaining issues to interest arbitration would constitute bad-faith bargaining and coercion of the employer in the selection of its representative, in violation of Section 8(b)(3) and Section 8(b)(1)(B) [of the Act]. [Footnotes omitted.]

In *Collier Electric*, the Board found the application of the interest arbitration provisions of the contract sufficiently arguable so that deferral to the Federal court action then pending was appropriate. The Board noted at 1099:

> As indicated deferral might not be appropriate in every case. It would be limited to circumstances where there is a reasonable basis in fact and law for the union's submission of the unresolved issues to interest arbitration. Deferring to the courts in the limited circumstances where a contract arguably binds an employer to an interest arbitration provision will obviate the problem of conflicting Board and court decisions and will lead instead to uniformity of results.

As the Board noted at 1099 fn. 18: ''In any event, we are not reluctant to put issues of contract interpretation in the capable hands of a court.'' It further noted at 1100:

> The Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), supports our decision that the Union should be allowed to pursue its contractual remedies in court. In *Bill Johnson's*, the Court held, inter alia, that if a lawsuit has a reasonable basis in fact or law, the Board may not enjoin the suit, but must allow it to proceed. . . .

The Board has subsequently applied the *Collier Electric* doctrine to several cases involving the National Joint Adjustment Board and the contract language of article X, section 8, involved here, beginning with *Sheet Metal Workers Local 283 (Conditioned Air)*, 297 NLRB 658, 659 (1990), and *Sheet Metal Workers Local 54 (Texas Sheet Metal)*, 297 NLRB 672 (1990). These cases determined whether the con-

tracts at issue ''could arguably be interpreted as binding the Employer to the interest arbitration provisions,'' *Sheet Metal Workers Local 283 (Conditioned Air)*, supra, 297 NLRB at 660. The Board in each case found no violation of the Act.

In *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140 (1991), the Board found the union had no reasonable basis for its claim that the employer was bound by an interest arbitration provision. The Board found therefore that the union's submission of its claim to the National Joint Adjustment Board and its subsequent action in asserting the validity of the National Joint Adjustment Board award in a counterclaim to the employer's Federal district court suit to set aside the National Joint Adjustment Board award was a violation of Section 8(b)(1)(B) of the Act.

In *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991), the Board applied the *Collier Electric* analytic framework: (1) to an independent signatory to a previously negotiated multiemployer agreement and (2) to a bargaining relationship governed by Section 8(f) of the Act. The Board found that there was an arguably binding contract providing for arbitration and that the union's submission to the National Joint Adjustment Board and subsequent effort to enforce the award in Federal court was supported by a reasonable basis in fact and law. Accordingly the Board found no violation of Section 8(b)(1)(B) of the Act and dismissed the complaint.

The Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), relied on by the Board in *Collier Electric*, is instructive respecting the manner in which Respondent's contract claims should be evaluated. In that case the Court addressed what steps the Board may take in evaluating the reasonable basis of a court action. The Court held, 461 U.S. at 744–745:

> Although the Board's reasonable-basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined.

2. Application of the *Collier Electric* standard to the instant case

Consistent with the Board's rule in deferral cases generally, I find it appropriate to consider the deferral issue at the threshold before turning to the merits of the unfair labor practice allegations under nondeferral standards. This is so because, if the matter is to be deferred, the case is to be dismissed without further inquiry.

Applying the *Collier Electric* standard as specified in greater detail in the cases cited, supra, and in particular the directions to the Board by the Court in *Bill Johnson's Restaurants*, quoted supra, I find the contract issues litigated here—which are also before the U.S. district court in an action involving both the Charging Party and Respondent: (1) present genuine issues of material fact turning on the credibility of witnesses and the proper inferences to be drawn from undisputed facts, and (2) involve legal questions of contract interpretation and application advanced by Respondent in support of its claim that the Charging Party is bound to the interest arbitration provisions of the contract which are arguable.[8]

More particularly, I find that the disputes respecting what wording was present on the critical 1985–1988 contract documents at the time they were signed by Rocky Fleeman as litigated by the parties' present classic questions of fact requiring the evaluation of credibility including consideration of the witnesses' demeanor and the weighing of the probability of events. The contract questions presented involve interesting and difficult legal issues of contract interpretation and consideration of such equitable doctrines as detrimental reliance and estoppel. Respondent's case, it seems to me, while not clear, overwhelming, or necessarily even ultimately persuasive, is also simply not properly characterized as inarguable.

My findings in this regard under the cases, cited supra, are legally equivalent in this context to an additional finding, which I also make, that Respondent had a reasonable basis for bringing the interest arbitration action against the Charging Party and for asserting the validity of the National Joint Adjustment Board award in Federal court.

In making these findings, I have considered the multiple theories of the General Counsel which attack the contract theory of Respondent at various stages in its logical sequence. At least some of the General Counsel's arguments, if sustained, obviate resolution of some of the factual issues which involve judicial evaluation of the credibility of witnesses and the drawing of inferences. I find, however, that, like Respondent's contract theory arguments, the resolution of the General Counsel's arguments and Respondent's opposing counterarguments is not so simple and free from doubt that Respondent's position must be considered inarguable or unreasonable.

In rejecting the General Counsel's arguments here, it is not so much that I find counsel for the General Counsel's arguments on the contract issues are inadequate, rather my view of the standard to be applied to Respondent's actions as established in the cited cases is that far more license is to be given to Respondent in this setting than the General Counsel proposes.

An additional and significant factor which I find especially warrants the Board's staying its hand in the instant case is the unusual factual situation presented by the existence of two contract-based arbitration awards under contest in the court litigation only one of which is under challenge in the unfair labor practice case. As noted, the Union brought two actions and obtained two awards against the Charging Party. The National Joint Adjustment Board interest arbitration award is before the Federal court. So, too, is the Local Joint Adjustment Board award in the same cause of action. The instant Board unfair labor practice case does not challenge as improper, and any remedy which could be directed in the case will not effect, the Local Joint Adjustment Board award.

Respondent's argument that the Charging Party is bound to the 1988–1991 contract is a common aspect in the instant case and the Federal court litigation addressing both awards. It may be presumed that, if the Federal court action goes for-

[8] In making this finding, I have first made a threshold determination based on the record as a whole and the demeanor of the witnesses that Respondent was not acting in bad faith or seeking to perpetrate a fraud in taking the actions identified in the record or in defending the instant action.

ward, the court will reach a single determination on the contract issue and, based on that finding, determine the validity of each of the two awards.

The General Counsel here is not attacking the Local Joint Adjustment Board grievance filed by Respondent, the award of the Local Joint Adjustment Board, or Respondent's defense of the Local Joint Adjustment Board award in its counterclaim in the U.S. district court action.[9] Therefore, even if the General Counsel prevails and obtains all the relief requested, the Federal district court action will still be required to decide the issues respecting the Charging Party's attack on the Local Joint Adjustment Board award and Respondent's counterclaim that the award is valid. Thus the Federal district court will still have to reach the contract issues presented here, irrespective of the outcome of the instant case.

The Board in *Collier Electric*, supra, 296 NLRB at 1099, held the courts are particularly well suited to determining whether employers are bound to interest arbitration provisions citing *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal Co.*, 786 F.2d 1459 (11th Cir. 1986); *Sheet Metal Workers Local 420 v. Huggins Sheet Metal*, 752 F.2d 1473 (9th Cir. 1985). As discussed supra, one reason for establishing a deferral policy is to avoid the dangers of conflicting Board and court contract interpretations. It seems particularly appropriate to defer an unfair labor practice proceeding to a currently pending Federal court action where the court's resolution will answer all the questions presented in the unfair labor practice case, but where the resolution of the unfair labor practice case by the Board will not resolve all the matters presented in the Federal court action. Only Board deferral in such a situation will insure a single resolution of the contract question, obviate the problem of conflicting Board and court decisions, and lead to uniformity of results explicitly favored by *Collier Electric* and its progeny as quoted supra.

Given all the above, I find it appropriate to defer the instant action to the current U.S. district court litigation between the parties. Consistent with the Board's decision in *Collier Electric*, I shall therefore dismiss the complaint.

3. The remaining issue of the potentially perpetual interest arbitration clause

As noted supra at footnote 7, the Charging Party argued that since the Union sought and obtained from the National Joint Adjustment Board an award which directed the Charging Party to sign a contract with yet another interest arbitration clause, a situation has been created where the Charging Party is potentially unable ever to free itself from a never ending series of interest arbitrations resulting in the imposition of an infinite number of contracts with interest arbitration clauses. The Charging Party argues, with case authority, that Section 8(b)(1)(B) of the Act is violated in such situations. See the Charging Party's brief (Br. 20–21).

In *Sheet Metal Workers Local 20 (Baylor Heating)*, supra, 301 NLRB at 261, the Board found insufficient evidence of union coercion to sustain an 8(b)(1)(B) finding where a union in taking an employer to an interest arbitration had sought essentially only to maintain the status quo with respect to the interest arbitration provisions in the contract. In finding no violation, the Board relied in part on the fact that the National Joint Adjustment Board award in the case was equivocal respecting interest arbitration in the new contract and the U.S. district court order enforcing the National Joint Adjustment Board award held the interest arbitration language could be included in the imposed agreement only through the mutual consent of the parties.

Federal courts, including the Ninth Circuit Court of Appeals wherein the instant U.S. district court action lies, clearly find void and unenforceable the inclusion of interest arbitration language in interest arbitration contract awards absent the consent of both parties. *American Metal Products v. Sheet Metal Workers*, 794 F.2d 1452, 1457 (9th Cir. 1986). It seems clear therefore that the U.S. district court or higher reviewing authority in the current court action will reach the same or similar result as the court in *Baylor Heating* respecting the interest arbitration language of the 1991–1994 agreement, should the issue ripen. Accordingly, I find the Charging Party's argument an insufficient basis to withhold deferral of this matter.

The Charging Party's argument in this regard requires further consideration. I do not find a simple dismissal warranted here however because of the fact, discussed above, that the National Joint Adjustment Board award directs the Charging Party to sign a contract which itself contains mandatory interest arbitration language.[10] The Charging Party should not be denied Board relief from such a clearly improper award based on an administrative law judge's bland assurance that the Federal courts will simply not allow that portion of the National Joint Adjustment Board's award which imposes new interest arbitration language in the new contract to stand. Rather, following the procedure of the Board in *United Technologies Corp.*, 268 NLRB 557, 560 (1984), I shall dismiss the case, but provide for retention of jurisdiction for the limited purpose of entertaining an appropriate motion for further consideration based on a showing that the portion of the National Joint Adjustment Award directing the Charging Party to sign a contract including mandatory interest arbitration provisions remains in effect on the conclusion of the current U.S. district court litigation.

On the basis of the above findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[9] Both at the hearing and on brief, the Charging Party argued that the Local Joint Adjustment Board award should be both part of the General Counsel's theory of a violation and a part of any directed remedy in the case. Counsel for the General Counsel did not make such a contention in her pleadings, on the record or on brief. It is the General Counsel, not the Charging Party, who has essentially plenary control over the scope of the allegations pled. The Charging Party therefore cannot expand the complaint.

[10] While the Board in *Bill Johnson's Restaurants* cases sometimes awaits the outcome of the court litigation in determining if a respondent's litigation was violative of the Act (see, e.g., *Dahl Fish Co.*, 279 NLRB 1084 (1986)), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987), the Board in *Collier Electric* and its progeny has dismissed unfair labor practice complaints following a finding that it is appropriate to allow the court action to proceed.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed, provided that:

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration based on a showing that the portion of the National Joint Adjustment Award directing the Charging Party to sign a contract including mandatory interest arbitration provisions remains in effect on the conclusion of the current Federal court litigation.